

or to continue to preside, in any adjudicative proceedings, that party may file with the Secretary a motion to disqualify and remove, supported by affidavit(s) setting forth the alleged grounds for disqualification. A copy of the motion and supporting affidavit(s) shall be served by the Secretary on the Presiding Officer whose removal is sought. The Presiding Officer shall have ten (10) days to respond in writing to such motion. However, the motion shall not stay the proceedings unless otherwise ordered by the Presiding Officer or the Commission. If the Presiding Officer does not disqualify himself/herself, the Commission shall determine the validity of the grounds alleged, either directly or on the report of another Presiding Officer appointed to conduct a hearing for that purpose and, in the event of disqualification, shall take appropriate action by assigning another Presiding Officer or requesting loan of another Administrative Law Judge through the U.S. Office of Personnel Management.

#### § 1025.43 Evidence.

(a) *Applicability of Federal Rules of Evidence.* Unless otherwise provided by statute or these rules, the Federal Rules of Evidence shall apply to all proceedings held pursuant to these Rules. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing.

(b) *Burden of proof.* (1) Complaint counsel shall have the burden of sustaining the allegations of any complaint.

(2) Any party who is the proponent of a legal or factual proposition shall have the burden of sustaining that proposition.

(c) *Admissibility.* All relevant and reliable evidence is admissible, but may be excluded by the Presiding Officer if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence.

(d) *Official notice*—(1) *Definition.* Official notice means use by the Presiding Officer or the Commission of facts not appearing on the record and legal con-

clusions drawn from those facts. An officially noticed fact or legal conclusion must be one not subject to reasonable dispute in that it is either:

(i) Generally known within the jurisdiction of the Commission or

(ii) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(2) *Method of taking official notice.* The Presiding Officer and/or the Commission may at any time take official notice upon motion of any party or upon its own initiative. The record shall reflect the facts and conclusions which have been officially noticed.

(e) [Reserved]

(f) *Offer of proof.* When an objection to proffered testimony or documentary evidence is sustained, the sponsoring party may make a specific offer, either in writing or orally, of what the party expects to prove by the testimony or the document. When an offer of proof is made, any other party may make a specific offer, either in writing or orally, of what the party expects to present to rebut or contradict the offer of proof. Written offers of proof or of rebuttal, adequately marked for identification, shall accompany the record and be available for consideration by any reviewing authority.

#### § 1025.44 Expert witnesses.

(a) *Definition.* An expert witness is one who, by reason of education, training, experience, or profession, has peculiar knowledge concerning the subject matter to which his/her testimony relates and from which he/she may draw inferences based upon hypothetically stated facts or offer opinions from facts involving scientific or technical knowledge.

(b) *Method of presenting testimony of expert witness.* Except as may otherwise be ordered by the Presiding Officer, the direct testimony of an expert witness shall be in writing and shall be filed on the record and exchanged between the parties no later than ten (10) days preceding the commencement of the hearing. The written testimony of an expert witness shall be incorporated into the record and shall constitute the direct testimony of that witness. Upon a

showing of good cause, the party sponsoring the expert witness may be permitted to amplify the written direct testimony during the hearing.

(c) *Cross-examination and redirect examination of expert witness.* Cross-examination, redirect examination, and re-cross-examination of an expert witness shall proceed in due course based upon the written testimony and any amplifying oral testimony.

(d) *Failure to file or exchange written testimony.* Failure to file or exchange written testimony of expert witnesses as provided in this section shall deprive the sponsoring party of the use of the expert witness and of the conclusions which that witness would have presented, unless the opposing parties consent or the Presiding Officer otherwise orders in unusual circumstances.

#### § 1025.45 In camera materials.

(a) *Definition.* In camera materials are documents, testimony, or other data which by order of the Presiding Officer or the Commission are kept confidential and excluded from the public record.

(b) *In camera treatment of documents and testimony.* The Presiding Officer or the Commission shall have authority, when good cause is found on the record, to order documents or testimony offered in evidence, whether admitted or rejected, to be received and preserve in camera. The order shall specify the length of time for in camera treatment and shall include:

(1) A description of the documents or testimony;

(2) The reasons for granting in camera treatment for the specified length of time; and

(3) The terms and conditions imposed by the Presiding Official, if any, limiting access to or use of the in camera material.

(c) *Access and disclosure to parties.* (1) Commissioners and their staffs, Presiding Officers and their staffs, and Commission staff members concerned with judicial review shall have complete access to in camera materials. Any party to the proceedings may seek access only in accordance with paragraph (c)(2) of this section.

(2) Any party desiring access to, or disclosure of, in camera materials for the preparation and presentation of

that party's case shall make a motion which sets forth its justification. The Presiding Officer or the Commission may grant such motion for good cause shown and shall enter a protective order prohibiting unnecessary disclosure and requiring any other necessary safeguards. The Presiding Officer or the Commission may examine the in camera materials and excise any portions prior to disclosure of the materials to the moving party.

(d) *Segregation of in camera materials.* In camera materials shall be segregated from the public record and protected from public view.

(e) *Public release of in camera materials.* In camera materials constitute a part of the confidential records of the Commission and shall not be released to the public until the expiration of in camera treatment.

(f) *Reference to in camera materials.* In the submission of proposed findings, conclusions, briefs, or other documents, all parties shall refrain from disclosing specific details of in camera materials. However, such refraining shall not preclude general references to such materials. To the extent that parties consider necessary the inclusion of specific details of in camera materials, those references shall be incorporated into separate proposed findings, conclusions, briefs, or other documents marked "Confidential, Contains In Camera Material," which shall be placed in camera and become part of the in camera record. Those documents shall be served only on parties accorded access to the in camera materials by these rules, the Presiding Officer, or the Commission.

#### § 1025.46 Proposed findings, conclusions, and order.

Within a reasonable time after the closing of the record and receipt of the transcript, all parties and participants may file, simultaneously unless otherwise directed by the Presiding Officer, post-hearing briefs, including proposed findings of fact and conclusions of law, as well as a proposed order. The Presiding Officer shall establish a date certain for the filing of the briefs, which shall not exceed fifty (50) days after the closing of the record except in unusual